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Nos. 03-1164 & 03-1165

IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

NEBRASKA CATTLEMEN, INC., *et al.*,
Petitioners,

v.

LIVESTOCK MARKETING ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONERS NEBRASKA CATTLEMEN, INC., GARY SHARP, AND RALPH JONES

GREGORY G. GARRE
LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Eighth Circuit erred in holding that the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901 *et seq.*, and regulations promulgated thereunder—which impose assessments on beef producers and importers to fund research, education, and promotional activities carried out by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives under the direct supervision and control of the Secretary of Agriculture—are "unconstitutional and unenforceable."

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioners in these consolidated cases are Ann M. Veneman (in her official capacity as the Secretary of Agriculture), the United States Department of Agriculture ("USDA"), the Cattlemen's Beef Promotion and Research Board ("Beef Board"), Nebraska Cattlemen, Inc. ("NCI"), Gary Sharp, and Ralph Jones. NCI is a nonprofit association representing Nebraska breeders, ranchers, and feeders, as well as county and local cattlemen's associations. NCI has no parent corporations and has issued no stock.

This case arises out of two appeals consolidated in the Eighth Circuit below: *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2769), and *Livestock Marketing Ass'n, et al.* v. *United States Dep't of Agric., et al.* (No. 02-2832). Petitioners Ann M. Veneman, USDA, and the Beef Board were appellants in No. 02-2769. Petitioners NCI, Gary Sharp, and Ralph Jones were appellants in No. 02-2832. Appellees in both cases (and respondents here) were Livestock Marketing Association, Western Organization of Resource Councils, Robert Thullner, Johnny Smith, Ernie J. Mertz, John Willis, Pat Goggins, Herman Schumacher, Jerry Goebel, and Leo Zentner.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	18
ARGUMENT	21
I. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS GOVERNMENT SPEECH AND IS THEREFORE NOT SUBJECT TO FIRST AMENDMENT SCRUTINY	21
II. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS CONSTITUTIONAL UNDER THE *CENTRAL HUDSON* ANALYSIS	39

TABLE OF CONTENTS—Continued

Page

III. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *WILEMAN* 47

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES:

Abood v. *Detroit Bd. of Educ.*, 431 U.S. 209 (1977) 34, 35

Block v. *Meese*, 793 F.2d 1303 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986) 22, 23

Board of Regents of the Univ. of Wisconsin Sys. v. *Southworth*, 529 U.S. 217 (2000) ..... *passim*

Carmichael v. *Southern Coal & Coke Co.*, 301 U.S. 495 (1937) 38

Central Hudson Gas & Elec. Corp. v. *Public Serv. Comm'n*, 447 U.S. 557 (1980) ..... *passim*

Charter v. *USDA*, 230 F. Supp. 2d 1121 (D. Mont. 2002), *appeal pending*, No. 02-36140 (9th Cir.) 33

Cochran v. *Veneman*, 359 F.3d 263 (3d Cir. 2004) 41

Glickman v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) ..... *passim*

Gurley v. *Rhoden*, 421 U.S. 200 (1975) 38

Head Money Cases, 112 U.S. 580 (1884) 38

Keller v. *State Bar of Cal.*, 496 U.S. 1 (1990) 22, 30, 35

Lathrop v. *Donohue*, 367 U.S. 820 (1961) 37

TABLE OF AUTHORITIES—Continued

Page

CASES:

Lebron v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995) ..... *passim*

Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001) 23, 28

Lehnert v. *Ferris Faculty Ass'n*, 500 U.S. 507 (1991) 44

Lorillard Tobacco Co. v. *Reilly*, 533 U.S. 525 (2001) 41, 42

NAACP v. *Hunt*, 891 F.2d 1555 (11th Cir. 1990) 37

Nicol v. *Ames*, 173 U.S. 509 (1899) 38

Roberts v. *United States Jaycees*, 468 U.S. 609 (1984) 41

Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) ..... *passim*

Rust v. *Sullivan*, 500 U.S. 173 (1991) 19, 28

Santa Fe Indep. Sch. Dist. v. *Doe*, 530 U.S. 290 (2000) 23, 28

Steward Mach. Co. v. *Davis*, 301 U.S. 548 (1937) 38

Student Gov't Ass'n v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473 (1st Cir. 1989) 22

United States v. *Frame*, 885 F.2d 1119 (3d Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

CASES:

United States v. *Lee*, 455 U.S. 252 (1982) 23

United States v. *Sperry Corp.*, 493 U.S. 52 (1989) 38

United States v. *United Foods, Inc.*, 533 U.S. 405 (2001) ..... *passim*

Warner Cable Communications, Inc. v. *City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991) 21-22

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 36, 37

Wooley v. *Maynard*, 430 U.S. 705 (1977) 36, 37

Zelman v. *Simmons-Harris*, 536 U.S. 639 (2002) 37-38

CONSTITUTION:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V 4, 23

STATUTES:

7 U.S.C. §§ 181 *et seq.* 47

7 U.S.C. § 206 48

7 U.S.C. § 207 48

7 U.S.C. § 212 48

7 U.S.C. §§ 601 *et seq.* 48

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

7 U.S.C. § 602(1) 47

7 U.S.C. §§ 1621 *et seq.* 48

7 U.S. C. § 1621 48

7 U.S.C. § 1622(h) 48

7 U.S.C. §§ 1635 *et seq.* 48

7 U.S.C. § 1635e 48

7 U.S.C. §§ 2901 *et seq.* ..... i, 2, 3

7 U.S.C. § 2901(a)(1) 2-3, 29, 35

7 U.S.C. § 2901(a)(2) 2-3, 10

7 U.S.C. § 2901(a)(3) 40

7 U.S.C. § 2901(a)(4) ..... *passim*

7 U.S.C. § 2901(b) ..... *passim*

7 U.S.C. § 2902(13) 13, 27

7 U.S.C. § 2902(14) 11

7 U.S.C. § 2903(b) 10

7 U.S.C. § 2904(1) ..... *passim*

7 U.S.C. § 2904(2) 24, 27

7 U.S.C. § 2904(2)(A) 11

7 U.S.C. § 2904(2)(B) 11

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

7 U.S.C. § 2904(2)(D) 11, 26

7 U.S.C. § 2904(2)(E) 11

7 U.S.C. § 2904(2)(F) 11

7 U.S.C. § 2904(3) 26

7 U.S.C. § 2904(4)(A) 10, 11, 24, 25, 27

7 U.S.C. § 2904(4)(B) ..... *passim*

7 U.S.C. § 2904(4)(B)(i) 27

7 U.S.C. § 2904(4)(B)(ii) 27

7 U.S.C. § 2904(4)(C) 11, 26, 27, 39

7 U.S.C. § 2904(5) 26

7 U.S.C. § 2904(6) 12, 26, 27

7 U.S.C. § 2904(7) 12, 26

7 U.S.C. § 2904(8) 12

7 U.S.C. § 2904(8)(A) 12

7 U.S.C. § 2904(8)(B) 12

7 U.S.C. § 2904(8)(C) 12, 38, 45

7 U.S.C. § 2904(9) 13

7 U.S.C. § 2904(10) ..... *passim*

7 U.S.C. § 2904(11) 12

7 U.S.C. § 2905 ..... 11, 33

TABLE OF AUTHORITIES—Continued

Page

STATUTES:

7 U.S.C. § 2906(a) 13, 39, 43

7 U.S.C. § 2906(b) 39, 43

7 U.S.C. §§ 6101 *et seq.* 5

7 U.S.C. § 7401 25

7 U.S.C. § 7401(a)(5) 25

7 U.S.C. § 7401(b)(1) 25

7 U.S.C. § 7401(b)(2) 20, 26, 39, 42

7 U.S.C. § 7401(b)(8) 26

7 U.S.C. § 7401(b)(8)(B) 25

21 U.S.C. §§ 601 *et seq.* 48

21 U.S.C. § 602 48

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

REGULATIONS:

7 C.F.R. Part 1260 13

7 C.F.R. § 1260.143(d) 33

7 C.F.R. § 1260.149 27

7 C.F.R. § 1260.150 27

7 C.F.R. § 1260.150(g) 11, 26

7 C.F.R. § 1260.150(m) 12, 26

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS:

7 C.F.R. § 1260.150(o) 12, 26

7 C.F.R. § 1260.151(a) 11

7 C.F.R. § 1260.167 27

7 C.F.R. § 1260.168 27

7 C.F.R. § 1260.168(b) 12, 26

7 C.F.R. § 1260.168(e) 11, 26

7 C.F.R. § 1260.168(f) 12, 26

7 C.F.R. § 1260.168(h) 12, 26

7 C.F.R. § 1260.168(i) 12, 26

7 C.F.R. § 1260.169 ..... 11, 26, 39

7 C.F.R. § 1260.172(b)(1) 12

7 C.F.R. § 1260.213 ..... 11, 25

7 C.F.R. § 1260.215(a) 13

7 C.F.R. § 1260.311(a) 12

LEGISLATIVE MATERIALS:

121 Cong. Rec. 31,436 (Oct. 2, 1975) 8

121 Cong. Rec. 38,005 (Dec. 1, 1975) 8

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131 Cong. Rec. 26,452 (Oct. 7, 1985) 10

H.R. Rep. No. 94-452 (1975) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE MATERIALS:

H.R. Rep. No. 99-271 (Part I) (1985) 10, 27, 43

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TABLE OF AUTHORITIES—Continued

Page

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James D. Richardson, 1 *Messages and Papers of the Presidents* (1903) 46

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

Theodore Roosevelt, *Ranch Life and the Hunting-Trail* (1888) 7

Jimmy M. Skaggs, *Prime Cut: Livestock Raising and Meatpacking in the United States 1607-1983* (1986) 6, 7, 8, 10

Rod Smith, *Industry Officials See Domino Effect*, Feedstuffs, Aug. 13, 2001 14

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TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Cattle* (Jan. 31, 2003) 45

U.S. Dep't of Agric., Release No. 0031.04, *Remarks by Sec'y Ann M. Veneman before House Agric. Comm.* (Jan. 21, 2004) 6

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR PETITIONERS NEBRASKA CATTLEMEN, INC., GARY SHARP, AND RALPH JONES

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 335 F.3d 711 and reproduced at 1a in the appendix ("Pet. App.") to the

petition for certiorari filed by petitioners Ann M. Veneman, *et al.* The opinion of the District Court is reported at 207 F. Supp. 2d 992 and reproduced at Pet. App. 31a.

JURISDICTION

The judgment of the Eighth Circuit was entered on July 8, 2003. Pet. App. 1a. On October 16, 2003, the Eighth Circuit denied timely petitions for rehearing en banc. Pet. App. 62a. On January 5, 2004, Justice Thomas extended the time for filing a petition for certiorari to and including February 13, 2004. The jurisdiction of the Eighth Circuit was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech * * *. [U.S. Const. amend. I.]

The relevant provisions of the Beef Promotion and Research Act of 1985, 7 U.S.C. §§ 2901 *et seq.*, and the regulations promulgated thereunder are reproduced at Pet. App. 63a-119a.

INTRODUCTION

This case presents a challenge brought under the Speech Clause of the First Amendment to the efforts of Congress and the Executive Branch to protect the Nation's most important agricultural commodity—beef. In 1985, after previous efforts had failed to alleviate a decades-old crisis in the beef industry, Congress found, *inter alia*, that "maint[aining] and expan[ding] * * * existing markets for beef and beef products [is] *vital* to the welfare of beef producers" and "to the general economy of the Nation," and that it is in the "public interest" "to strengthen the beef industry's position in the market-

place." 7 U.S.C. §§ 2901(a)(1), (2), (4), (b) (emphasis added). Congress's legislative response to those findings—the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901 *et seq.*—is the subject of the First Amendment challenge in this case.

The Beef Act requires cattle producers and importers to pay a one dollar assessment (or "checkoff") on each head of cattle sold in the United States to fund research, education, and promotional activities—including generic advertising, such as the award-winning "Beef. It's What's For Dinner" ad campaign. To achieve the Act's important governmental objectives, Congress created two special administrative bodies—the Cattlemen's Beef Promotion and Research Board ("Beef Board") and the Beef Promotion Operating Committee ("Operating Committee")—to carry out a national "coordinated program of promotion and research" under the direct supervision and control of the Secretary of Agriculture. *Id.* § 2901(b).

The Eighth Circuit below declared the Beef Act "unconstitutional and unenforceable" in its entirety on the ground that the First Amendment precludes the imposition of assessments on the sale of cattle to fund generic advertising to increase demand for beef. Pet. App. 28a. That decision is fundamentally flawed. The generic advertising conducted under the Beef Act—prescribed in the first instance by Congress and formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives—is quintessential government speech. Under the government speech doctrine, the generic advertising is therefore not subject to First Amendment scrutiny.

The First Amendment provides that " 'Congress shall make no law * * * abridging the freedom of speech.' " The First Amendment thus limits government interference with *private*

speech; it does not limit the government's *own* speech. As this Court has held, "when [the government] is the speaker or when it enlists private entities to convey its own message * * * it is entitled to say what it wishes." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Likewise, the First Amendment does not limit the manner in which the government may choose to fund its speech—especially here. Under the Beef Act, no one is prevented from speaking out or compelled to express any viewpoint. Producers merely are required to pay a modest assessment—one dollar per head of cattle that may have sold for more than $1,000—to fund promotional and other activities by the *government* which are designed to benefit the beef industry. Thus, no producer's speech is in any way "abridged" within the meaning of the First Amendment.

That does not mean that the promotional activities at issue are beyond *all* challenge. Like any other government program, the Beef Act remains subject to other constitutional constraints, such as the Due Process Clause. Moreover, if any producer disagrees with the government's speech under the Beef Act, it can petition Congress or the Beef Board to change the government's message, or it can lobby fellow producers to terminate the program through the Beef Act's built-in referendum mechanism. But the First Amendment does not give citizens—including beef producers—the right to avoid federal assessments simply because they disagree with the way in which those assessments are spent.

Although it is not necessary for the Court to go beyond the government speech doctrine to dispose of this case, the Eighth Circuit's decision also is erroneous for two additional reasons. First, the Beef Act is constitutional under the traditional test for commercial speech articulated by this Court in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U.S. 557 (1980). There is no question that the Beef Act—enacted "to strengthen the beef industry's position in the marketplace" and improve "the general

economy of the Nation"—serves substantial governmental interests, and requiring producers to fund generic advertising which directly advances those interests is no more extensive than necessary to achieve those goals.

Second, the Beef Act is constitutional under this Court's decision in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457, 477 (1997), where the Court held that mandatory assessments to fund generic advertising under a similar marketing program for California tree fruit survived First Amendment scrutiny as "a species of economic regulation." In *United States* v. *United Foods, Inc.*, 533 U.S. 405, 415 (2001), this Court held that mandatory assessments to fund generic advertising under the Mushroom Promotion, Research, and Consumer Information Act ("Mushroom Act"), 7 U.S.C. §§ 6101 *et seq.*, violated the First Amendment because the generic advertising was "not part of some broader regulatory scheme." Here, by contrast, the generic advertising at issue *is* part of a "broader regulatory scheme" governing the beef industry. Accordingly, as in *Wileman*, the collection of assessments to fund the generic advertising of beef is "simply a question of economic policy for Congress and the Executive to resolve." *Wileman*, 521 U.S. at 468.

For any one of these reasons, the erroneous judgment of the Eighth Circuit should be reversed, and the considered judgment of Congress as to how to protect the Nation's most important agricultural industry should be allowed to stand.

STATEMENT OF THE CASE

The American Beef Industry. The beef industry is the largest sector of the American agricultural economy. Dan Otto & John D. Lawrence, *Economic Impact of the United States Beef Industry* 1 (2001) (*available at* hhtp://www.beef.org). Cattle are produced in each of the fifty States, and the economic impact of their production "contributes to almost every county in the nation." *Id.* Over a million Americans raise cattle and depend on the sale of

beef for their livelihood. *Id.* Millions more "indirectly depend upon beef for their livelihood—farmers who grow grain and other feed for the cattle; factory workers who manufacture machinery, pharmaceuticals and related items used by cattlemen; meat processors who slaughter, pack and transport beef; meat cutters and retail clerks who prepare and sell beef; and many more." H.R. Rep. No. 94-452, at 2 (1975).

In recent years, gross receipts from the sale of cattle have totaled nearly $40 billion annually and have accounted for one-fifth of total agricultural sales. Otte & Lawrence, *supra*, at 1. The production of beef, moreover, has generated approximately $150 billion in additional economic output. *Id.* The United States is also one of the world's largest exporters of beef. More than ten percent of U.S. beef—some 2.6 billion pounds—was exported in 2003. *See* U.S. Dep't of Agric., Release No. 0031.04, *Remarks by Sec'y Ann M. Veneman before House Agric. Comm.* 4 (Jan. 21, 2004).

But the economics alone do not tell the whole story. The American beef industry—older than the Nation itself—has left an indelible mark on this Nation's history and has played a unique role in shaping our national identity. In 1607, cattle arrived at Jamestown along with its settlers aboard the *Susan Constant*. James W. Thompson, *History of Livestock Raising in the United States, 1607-1860* 54 (1942) ("*History of Livestock Raising*"); Jimmy M. Skaggs, *Prime Cut: Livestock Raising and Meatpacking in the United States 1607-1983* 11 (1986) ("*Prime Cut*"). In 1624, the Pilgrims brought cattle—"three heifers and a bull"—to Plymouth Rock. David Wheeler, *The Beef Cattle Industry in the United States: Colonial Origins*, 46 Panhandle-Plains Historical Review, 54, 56 (1973) ("*Colonial Origins*"); *History of Livestock Raising* at 14. Even before America declared its independence, New Englanders had begun producing a surplus of cattle for export. Cattle were driven to slaughterhouses in Boston, New York, and Philadelphia. Salted beef was then

exported to other colonies, the West Indies, and British Guiana, where there was a growing appetite for beef. *Colonial Origins* at 60-61.

As New England became more industrial in the decades following the Revolutionary War, the cattle industry migrated westward in search of open—and, in some cases, free—lands for grazing. *Prime Cut* at 11, 18. By 1800, cattle country had spread to the Alleghenies and the Ohio Valley; by 1860, to Illinois and Missouri; and by 1880, to the Great Plains. *History of Livestock Raising* at 66. In pushing further westward, the cattle industry secured a permanent place in American lore. In the late 1800s, hundreds of thousands of cattle were driven northwards from Texas along cattle trails, including the legendary Chisholm Trail. Cattle were often driven up the trail by "cowboys" and were raised on sprawling ranches. *Prime Cut* at 29-30, 55-56, 58. The allure of the ranching life drew many easterners to the new frontier, including, in 1884, a greenhorn Theodore Roosevelt, who purchased an interest in a ranch and more than a thousand head of cattle in the Dakota Territory. *Id.* at 59. *See* Theodore Roosevelt, *Ranch Life and the Hunting-Trail* (1888).

At the same time that the beef industry was shaping the western frontier, it also began transforming the urban marketplace. It has been said that Chicago grew into a metropolis largely because of the livestock trade. *Prime Cut* at 44. In the early 1800s, Chicago was linked by the Great Lakes and the Erie Canal to the eastern markets; by the end of the century, Chicago had become a hub for the great railroads spiking west. Thus situated, Chicago became home to some of the country's largest stockyards—centralized livestock markets which gave rise to a whole new class of merchants who brokered sales for buyers and sellers, and where cattle are still sold in many parts of the country today. *Id.* at 44-49.

Given its exceptional economic and symbolic importance to the Nation, it is not surprising that the federal government has long taken an active role in promoting the beef industry. In 1862, Congress established the United States Department of Agriculture ("USDA"), regarded as the federal government's first "client-oriented" agency. *Id.* at 80. By the turn of the century, USDA had already established programs designed to help cattle producers control costly diseases and produce meatier and thus more profitable herds. Especially in wartime, the federal government has adopted programs regulating the production and consumption of beef, including programs imposing price controls and other measures to stabilize the beef market, providing financial assistance to producers, and encouraging consumers to ration, often by appealing directly to their patriotism, such as by exhorting Americans (during World War I) to observe "meatless Tuesdays" to ensure a sufficient supply of beef for the troops. *Id.* at 6-7, 80-87, 145-146. Congress has also enacted numerous statutory programs regulating the beef industry that remain in effect today. *See* Part III, *infra*.

The Beef Research and Information Act. In the mid-1970s, the beef industry reached a crisis point in its history. Cattle producers were suffering "widespread losses," H.R. Rep. No. 94-452, at 3, due in part to "soaring feed and production costs" as well as "plummeting market prices." 121 Cong. Rec. 31,436 (Oct. 2, 1975) (statement of Rep. Railsback). The total inventory value of U.S. cattle had dropped from $40.9 billion on January 1, 1974, to $20.9 billion on January 1, 1975. H.R. Rep. No. 94-452, at 3. *See also* 121 Cong. Rec. at 38,114 (Dec. 2, 1975) (statement of Sen. Hruska) (in the past two years cattle producers had lost "between $2.75 and $5 billion"). Some cattle producers went bankrupt; many more were forced to sell their herds and turn to other enterprises. H.R. Rep. No. 94-452, at 3. Still others were forced to reduce their herds through slaughter. 121 Cong. Rec. at 38,005 (Dec. 1, 1975) (statement of Sen. Dole)

("The slaughter of cows, a sure sign of declining productive capacity, has been at a record rate in recent months and could total an unprecedented 11 million head in 1975."). The economic repercussions of the crisis reached "financial institutions, allied industries and the entire economies of many communities." H.R. Rep. No. 94-452, at 3.

"[A]gainst this backdrop of concern," Congress enacted the Beef Research and Information Act—the predecessor of the Beef Act. *Id.* The Act provided for "[a] program of research, producer and consumer information and promotion to improve production, marketing and utilization of cattle, beef and beef products to be carried out with funds derived from producer assessments." *Id.* at 5-6. Although the "major emphasis" of the program was not intended to be "on advertising and paid media promotion," S. Rep. No. 94-463, at 6 (1975), Congress recognized that promotion of beef was important to producers and consumers alike. As one Committee Report explained, "[i]f cattlemen know that consumers will continue to buy beef, then cattlemen will increase production—and both parties will benefit." H.R. Rep. No. 94-452, at 3. The program was to be carried out by a "Beef Board," the members of which would be appointed by the Secretary of Agriculture from nominations submitted by eligible producer organizations. *Id.* at 6. Congress specifically intended that "[f]or purposes of administering the Act, *the Beef Board shall act as an agency of the Department of Agriculture.*" *Id.* at 4-5 (emphasis added).

Because the Act contained a refund mechanism, the program was considered "entirely voluntary." *Id.* at 5. Nevertheless, the program was to go into effect only upon the approval of at least two-thirds of producers voting in a referendum. In 1977, a referendum on the Act was held; although 56.6% of voting producers voted in favor of the referendum, it failed to carry the requisite two-thirds majority. The Act was subsequently revised to require only a simple majority. In 1980, a second referendum was held, but

it, too, failed to pass. Charles E. Ball, *Building the Beef Industry* 231 (1998).

The Beef Promotion and Research Act of 1985. In 1980, American beef consumption dropped to its lowest level since 1965 as beef prices rose and beef became the subject of adverse publicity raising concerns about its safety and nutritional value. *Prime Cut* at 168. By the mid-1980s, cattle producers were facing "the worst market in 17 years." 131 Cong. Rec. 26,452 (Oct. 7, 1985) (statement of Sen. Lott). The Nation's cattle herd had shrunk to a 23-year low, and beef prices were plummeting. *Id.* at 26,529 (Oct. 8, 1985) (statement of Rep. Smith). *See also* H.R. Rep. No. 99-271 (Part I), at 185 (1985) ("Despite decreasing cattle numbers, fed cattle prices are now (summer of 1985) at the lowest point in seven years.").

This time, Congress responded by enacting the Beef Act to "revise[] and strengthen[]" the Beef Research and Information Act. *Id.* at 7. Recognizing that "the production of beef and beef products plays a significant role in the Nation's economy," and that "the maintenance and expansion of existing markets for beef and beef products are vital to * * * the general economy of the Nation," Congress enacted the Beef Act to "strengthen the beef industry's position in the marketplace" through a "coordinated program of promotion and research." 7 U.S.C. §§ 2901(a)(2), (4), (b). To accomplish these "vital" objectives, the Act directed the Secretary of Agriculture to promulgate a "beef promotion and research order" ("Beef Order"). *Id.* §§ 2901(a)(4), 2903(b).

As required by the Act, the Beef Order provides for the establishment and selection of the Beef Board and the Operating Committee to administer the program under the direct supervision and control of the Secretary of Agriculture. *Id.* §§ 2903(b), 2904(1), (4)(A). All the members of the Board are appointed by the Secretary, who receives nominations from importers and certified State organizations repre-

senting producers. *Id.* §§ 2904(1), 2905. The Board elects ten of its members to serve on the Operating Committee, together with ten producers elected by a federation that includes as members qualified State beef councils. *Id.* § 2904(4)(A).[1] The Act provides that the Board shall "administer the order in accordance with its terms and provisions," "make rules and regulations to effectuate the terms and provisions of the order," "receive, investigate, and report to the Secretary complaints of violations of the order," and "recommend to the Secretary amendments to the order." 7 U.S.C. §§ 2904(2)(A), (B), (E), (F). Any Board or Committee member or employee who "fails or refuses to perform his or her duties properly" may be removed by the Secretary. 7 C.F.R. § 1260.213.

The Act specifically provides that the Committee shall "develop plans or projects of promotion and advertising, research, consumer information, and industry information." *Id.* § 2904(4)(B). *All* such plans and projects must be submitted to the Secretary for approval. 7 C.F.R. §§ 1260.168(e), 1260.169. The Committee must also prepare an annual budget for promotion and research activities, which is reviewed and subject to approval first by the Board and then by the Secretary. 7 U.S.C. §§ 2904(2)(D), (4)(C). The Board must also prepare and submit a budget (which includes the Committee's anticipated expenses and disbursements) for the Secretary's approval, and is authorized to incur such expenses as the Secretary deems reasonable. 7 C.F.R. §§ 1260.150(g), 1260.151(a).

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[1] A "qualified State beef council" is an entity organized under state law that conducts beef promotion and research and is recognized by the Board as the beef promotion entity in that State. 7 U.S.C. § 2902(14). The producers elected by the federation must be certified by the Secretary as producers that are directors of a qualified State beef council, and the Secretary must certify that such directors are duly elected by the federation as representatives to the Committee. *Id.* § 2904(4)(A).

With the Secretary's approval, the Committee may enter into contracts for implementing and carrying out the research, education, and promotional activities authorized by the Act. 7 U.S.C. § 2904(6); 7 C.F.R. §§ 1260.168(b), (f). Such contracts must provide, among other things, that the plan or project shall become effective upon the approval of the Secretary, as well as that the contracting party shall make such reports as the Secretary, Board, or Committee may require, and that the Secretary, Board, and Committee may periodically audit the party's records. 7 U.S.C. § 2904(6); 7 C.F.R. § 1260.168(f). The Board and Committee must maintain such books and records, which shall be available to the Secretary for inspection and audit, as the Secretary may prescribe, and must prepare and submit such reports as the Secretary may prescribe. 7 U.S.C. § 2904(7). The Board and Committee must also submit information to the Secretary as requested, and must give the Secretary notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. §§ 1260.150(m), (o), 1260.168(h), (i).

The research, education, and promotional activities authorized by the Act are funded by assessments—or "checkoffs"—paid by producers and importers in the amount of one dollar per head of cattle sold in the United States. 7 U.S.C. §§ 2904(4)(B), (8). Each person purchasing cattle from a producer is designated a "collecting person" and is required to collect assessments from the producer and remit them to a qualified State beef council (which in turn remits assessments to the Board) or, if there is no qualified State beef council in the State in which the person resides, directly to the Beef Board. *Id.* §§ 2904(8)(A), (B); 7 C.F.R. § 1260.311(a).[2] Assessments paid by importers are collected through the U.S. Customs Service. 7 C.F.R. § 1260.172(b)(1). All "collecting

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[2] A producer who can establish participation in a program of an established qualified State beef council is entitled to a credit of up to 50 cents per head of cattle for contributions to such program. 7 U.S.C. § 2904(8)(C).

persons" must make their records available to the Secretary for inspection, and must file such reports as the Secretary prescribes. 7 U.S.C. § 2904(11).

The Act specifies that the promotion conducted thereunder must "advance the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." *Id.* § 2902(13). At the same time, the Act expressly prohibits the use of assessments collected by the Board for "influencing governmental action or policy, with the exception of recommending amendments to the order." *Id.* § 2904(10). With the Secretary's approval, the Board may invest such funds, pending disbursement, in certain obligations and interest-bearing accounts. *Id.* § 2904(9). Any patents, copyrights, inventions, or publications developed through the use of checkoffs are "the property of the U.S. Government." 7 C.F.R. § 1260.215(a).

The Beef Order and related regulations were issued by the Secretary in 1986. *See* 7 C.F.R. Part 1260. Within 22 months after the Beef Order was issued, the Secretary was required to conduct a referendum among producers and to continue the checkoff program only if approved by a majority of producers voting in the referendum. 7 U.S.C. § 2906(a). In May 1988, the referendum was conducted and approved by nearly 80% of voting producers. *See* J.A. 146.

Promotion and Research Under the Beef Act. For nearly two decades, the Beef Board and Operating Committee have developed and implemented research, education, and promotional projects in accordance with their express statutory mandate. Promotional activities include generic advertising, such as the "Beef. It's What's For Dinner" ad campaign. Research and education projects have addressed such topics as food-borne pathogens, the proper handling of beef products, nutrition and health, and cattle diseases,

including so-called "mad cow" disease or bovine spongiform encephalopathy ("BSE").

Since its inception, the checkoff program has proven to be a great success. *See, e.g.*, Rod Smith, *Industry Officials See Domino Effect*, Feedstuffs, Aug. 13, 2001, at 1 (program "halted a 20-year beef demand erosion"). As a recent study shows, the program has had "a positive and statistically significant impact on the retail purchases of beef," and "is shown to attract new consumers to the beef market." Ronald W. Ward, *Beef Demand and Its Response to the Beef Check-off* 1 (2001) (*available at* http://www.beefboard.org). Indeed, just this year, the "Beef. It's What's For Dinner" ad campaign was recognized for its effectiveness in increasing consumer demand for beef and awarded an EFFIE, one of the advertising industry's most coveted and prestigious awards. *See Checkoff-Funded Programs Earn Advertising, Marketing Awards: Innovative Campaigns Win Top Honors for Effectiveness*, Checkoff News, May 3, 2004 (*available at* http://www.beefboard.org).

In 2003, the Beef Board spent $26.7 million on domestic promotional activities—including the "Beef. It's What's For Dinner" campaign—accounting for about 54 percent of the Board's total expenses. 2003 Beef Board Annual Report 3 ("Beef Report"). The Board's television and print advertising reached 93 percent of adults aged 25-54 more than 12 times with a cost-per-impression of less than a penny. *Id.* at 6. Print ads appeared in 19 consumer magazines and TV commercials ran more than 1,500 times, with major campaigns centered around the Super Bowl and the summer holiday weekends. *Id.*; *Beef Enjoyment Ad Campaign Reaches Target: 72 Percent of Consumers Who Have Seen Ads Rank Beef As Best Protein*, Checkoff News, Jan. 28, 2004; *Checkoff Shares Beef Messages Through Nation's Media: Program Reaches Combined Circulation of 346.1 Million in One Quarter*, Checkoff News, Jan. 28, 2004. Another $5.1 million in promotional activities—roughly ten

cents of every dollar spent—targeted foreign marketplaces. *See* Beef Report at 3; *Global Marketing Committees Update Producers on Demand Efforts*, Checkoff News, Feb. 6, 2004.

At the moment, the checkoff program may be more vital than ever. On December 23, 2003, a BSE-infected cow was discovered in the United States. The Beef Board immediately responded to the crisis, allocating $1 million in checkoff funds to purchase additional radio ads leading up to the Super Bowl and to finance informational activities designed to educate the public on BSE and the safety of U.S. beef, including the launch of a new website focusing on BSE (www.bseinfo.org). *See Beef Board Approves Additional Funding to Manage BSE Response: Executive Committee Activates $1 Million Crisis Response Plan*, Checkoff News, Jan. 8, 2004; *Checkoff Adjusts Demand-Building Programs In Light of BSE Find: Additional Funds Applied to Nationwide, Key Market Radio Advertising*, Checkoff News, Jan. 19, 2004. The ability to respond swiftly—and *nationally*—to the BSE case has proven critical in maintaining consumer confidence in—and thus demand for—U.S. beef. *See Beef Industry Plan Keeps Consumers Confident in U.S. Beef Safety*, Checkoff News, Jan. 28, 2004.

Despite the overall safety of U.S. beef, the single case of BSE caused the United States to "suffer[] a major trade disruption" with the closing of more than 70 foreign markets to U.S. beef imports. U.S. Dep't of Agric., Foreign Agric. Serv., *Livestock & Poultry: World Markets & Trade* 5 (Mar. 2004). As a result, U.S. beef exports for 2004 are forecast at "just 17 percent of 2003 exports." *Id.* *See also id.* at 1 ("The U.S. share of the world beef market in 2004 is forecast to fall from 18 percent to 3 percent."). Importantly, however, "[l]ower production and *robust consumer demand* are helping to support cattle prices." *Id.* at 5 (emphasis added). The checkoff program—statistically proven to stimulate demand for beef—is thus playing a critical role in ensuring the welfare of the U.S. beef industry during this volatile

period. *See Expanded Beef Marketing Campaign Will Work to Boost Demand*, Checkoff News, Apr. 7, 2004 (announcing national advertising campaign "to address potential increased beef supplies caused by closed export markets for U.S. beef").

Proceedings Below. In December 2000, respondents brought this action challenging the Secretary's implementation of the checkoff program on various grounds. Petitioners Nebraska Cattlemen, Inc., Gary Sharp, and Ralph Jones—a nonprofit state cattlemen's association and two South Dakota cattle producers who, like the vast majority of their fellow producers, support the checkoff—intervened to defend the checkoff program. On June 25, 2001, while this case was pending, this Court issued its decision in *United Foods*. Respondents thereafter amended their complaint to allege that the use of assessments to fund generic advertising pursuant to the Beef Act violates the First Amendment.

After a two-day trial at which petitioners presented substantial, unrebutted evidence concerning the Secretary's extensive oversight and control of the checkoff program, the District Court issued a decision declaring the Beef Act unconstitutional under the First Amendment. Pet. App. 31a. Among other things, the court rejected the argument that the generic advertising conducted under the Beef Act is government speech. The court acknowledged that "the Board * * * [was] created by statute to further the policy of the United States Congress to promote beef for the purpose of strengthening the beef industry's position in the marketplace," and that "the Secretary must approve the appointment of those nominated." Pet. App. 54a-55a. The court also acknowledged that "all projects are submitted to the Secretary for final approval to spend checkoff funds," and that "USDA employees attend every meeting of the Board, the Operating Committee, and the [Board's] Executive Committee." *Id.* Nevertheless, the court concluded—without citation to the record—that the Secretary's oversight of the checkoff

program is "ministerial" and "pro forma." Pet. App. 54a-55a. The court also found it significant that the generic advertising is funded by assessments on the sale of cattle, rather than general tax revenues. Pet. App. 53a.

The court thus issued an order striking down the *entire* Beef Act and enjoining the further collection of *any* assessments under the Act. Even though assessments collected under the Act are also used to fund research and education projects—activities the District Court itself acknowledged were "unobjectionable"—the court refused to limit its injunction to the collection of assessments to fund promotion, or to limit relief to the five individual respondents found to have standing in this case. Pet. App. 57a-58a.

The Eighth Circuit's Decision. The Eighth Circuit affirmed. The court acknowledged that "[t]he government speech doctrine has firm roots in our system of jurisprudence." Pet. App. 15a. In its view, however, "when the government speaks, it is [not] entirely immune from all types of First Amendment free speech claims." Pet. App. 16a. Rather, the court opined, "when the government speaks in its role as the government, it may be immune from First Amendment challenge *based upon its choice of content*." Pet. App. 16a-17a (emphasis added). In this case, the court observed, respondents "are challenging the government's authority to compel them to support speech with which they personally disagree," and not "the content of government speech." Pet. App. 17a. "The two categories of First Amendment cases—government speech cases and compelled speech cases—are fundamentally different." *Id.*

Because the Eighth Circuit concluded that the government speech doctrine does not apply in cases involving the compelled funding of speech, the court never determined whether the generic advertising conducted under the Beef Act is government speech. Instead, the court purported to "adapt" the *Central Hudson* test to this case, reasoning that, "had the

government relied upon *Central Hudson* in *United Foods*, the Supreme Court would have adapted the *Central Hudson* test to the circumstances of that case." Pet. App. 21a-22a. Although the court recognized that this Court did not apply *Central Hudson* in *United Foods*, the court nevertheless concluded that *United Foods* was ultimately dispositive of the *Central Hudson* analysis in this case. *See* Pet. App. 26a-28a. The court thus declared the entire Beef Act "unconstitutional and unenforceable," Pet. App. 28a, upholding the District Court's nationwide injunction enjoining the further collection of *any* assessments under the Act. Pet. App. 29a.[3]

SUMMARY OF ARGUMENT

The First Amendment presents no bar to Congress's efforts to protect the Nation's most important agricultural commodity—beef—through a generic advertising program funded by a one dollar assessment on the sale of that commodity.

A. The government frequently engages in speech to promote particular policies or programs—whether to discourage smoking, support the Armed Forces, or to encourage energy conservation—and when the government does so it does not violate the First Amendment even though tobacco farmers, pacifists, or energy producers may disagree with its message. Like the government's expressive activities to convey the message that smoking is bad and energy conservation is good, the government's promotion of beef pursuant to the Beef Act is government speech, and thus immune from scrutiny under the Speech Clause of the First Amendment.

Under this Court's decision in *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Beef Board and Operating Committee are part of the government for First Amendment purposes. The Board and Committee were

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[3] The Eighth Circuit denied timely petitions for rehearing en banc, although two judges voted to grant rehearing, and another did not participate in the matter. Pet. App. 62a.

created by special statute explicitly for the furtherance of governmental objectives. All the members of the Board and half the members of the Committee are appointed by the Secretary of Agriculture, who has the power to remove all members of both. The Beef Act and Beef Order specifically prescribe the content of the speech in which the Board and Committee may engage, and further provide that the specific messages they formulate must be approved in advance by the Secretary. Moreover, as the record in this case reflects, the Secretary exercises extensive oversight and control over all aspects of the checkoff program. Accordingly, the speech those entities engage in pursuant to and under the strictures of the Beef Act is unquestionably *government* speech.

But even if this Court were to conclude that the Board and Committee are not governmental entities under *Lebron*, the generic advertising conducted under the Beef Act would *still* constitute government speech. The government may—and frequently does—use private entities "to convey a governmental message," or "to transmit specific information pertaining to its own program." *Rosenberger*, 515 U.S. at 833. *See, e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991). Here, the generic advertising is prescribed in the first instance by Congress and formulated and communicated under the direct supervision and control of the Secretary of Agriculture by special administrative bodies created by Congress for the express purpose of furthering important governmental objectives. Thus, it is clear that when the Board and Committee speak, they do so on behalf of the government.

The fact that the generic advertising is financed by assessments on the sale of cattle does not somehow transform the character of that speech from government to private speech. The First Amendment does not constrain the government's ability to engage in speech of its own, whether such speech is funded by general tax revenues "or other exactions." *Board of Regents of the Univ. of Wisconsin Sys.* v. *Southworth*, 529 U.S. 217, 229 (2000). It is well established that the govern-

ment has broad leeway to choose how to fund its programs. Had Congress elected to fund the generic advertising under the Beef Act with general taxpayer dollars, there would be no question that the program's speech is government speech. The constitutional analysis should be no different simply because Congress opted instead to impose a modest assessment on those who, in Congress's judgment, "most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2)—*i.e.*, those who choose to sell the commodity Congress has chosen to promote.

B. Even if this Court were to conclude that the generic advertising under the Beef Act is not government speech, such advertising is still *commercial* speech, and survives First Amendment scrutiny under the test articulated by this Court in *Central Hudson*. First, it cannot be gainsaid that Congress's objectives in enacting the Beef Act—to "maint[ain] and expan[d] * * * existing markets for beef" and thereby improve "the general economy of the Nation," 7 U.S.C. §§ 2901(a)(4)—are "substantial" governmental interests. *Central Hudson*, 447 U.S. at 566. Second, the Beef Act—statistically proven to increase consumer demand for beef—"directly advances" those interests. *Id.* And third, the Beef Act is no "more extensive than necessary to serve" those interests. *Id.* The Act does not compel any person to speak, it does not call for the financing of any political or ideological speech, and it does not prevent anyone from speaking out against the government's message. It simply requires producers and importers to pay a modest assessment to support the *generic* promotion of beef—from which, in Congress's judgment, they all benefit.

C. The generic advertising under the Beef Act is also constitutional under this Court's decision in *Wileman*. There, this Court upheld a similar generic advertising program for California tree fruit because the program was viewed as "a species of economic regulation" and therefore not subject to First Amendment scrutiny. *Wileman*, 521 U.S. at 477. In

United Foods, this Court distinguished *Wileman* on the ground that the mushroom promotion program was "not part of some broader regulatory scheme." *United Foods*, 533 U.S. at 415. Here, by contrast, the generic advertising conducted under the Beef Act *is* part of a "broader regulatory scheme." Like the marketing orders in *Wileman*, numerous statutes regulating the sale and marketing of beef help "establish and maintain orderly marketing conditions and fair prices for agricultural commodities." *Wileman*, 521 U.S. at 461. Because the generic advertising under the Beef Act is thus properly viewed as "a species of economic regulation," *id.* at 477, it simply "[does] not raise First Amendment concerns." *United Foods*, 533 U.S. at 415.

ARGUMENT

I. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS GOVERNMENT SPEECH AND IS THEREFORE NOT SUBJECT TO FIRST AMENDMENT SCRUTINY.

1. Like private citizens and corporations, government at various levels regularly contributes its voice to the marketplace of ideas. As the Third Circuit observed in *United States* v. *Frame*, 885 F.2d 1119, 1131 (3d Cir. 1989):

> Citizens' tax dollars purchase a considerable amount of "government speech." Not only does the government speak on behalf of its citizens when it airs advertisements warning of the dangers of cigarette smoking or drug use, praising a career in the armed services, or offering methods for AIDS prevention, each time the President of the United States meets with a foreign dignitary, or state department officials enter into arms control negotiations, the government is engaging in expressive activities on behalf of everyone.

See also Warner Cable Communications, Inc. v. *City of Niceville*, 911 F.2d 634, 638 (11th Cir. 1990) ("government

may participate in the marketplace of ideas and contribute its views to those of other speakers") (quotation omitted); *Student Gov't Ass'n* v. *Board of Trustees of Univ. of Mass.*, 868 F.2d 473, 482 (1st Cir. 1989) ("In addition to its role as a regulator, the state plays an important role as a participant in the marketplace of ideas."); *Block* v. *Meese*, 793 F.2d 1303, 1314 (D.C. Cir. 1986) ("[T]he guarantee of freedom of speech does not * * * prevent government from adding its own voice to the many that it must tolerate.") (Scalia, J.) (quotation omitted).

The government's speech necessarily is paid for by citizens who may or may not agree with the government's message. That fact, however, provides no basis for preventing the government from taking and communicating a position on issues of public concern, or for any individual to demand the return of his or her tax dollars if he or she happens to disagree with the government's message. *Southworth*, 529 U.S. at 229 (the government may spend "*funds raised* * * * for speech and other expression to advocate and defend its own policies") (emphasis added); *Rosenberger*, 515 U.S. at 833 ("when the government appropriates *public funds* to promote a particular policy of its own it is entitled to say what it wishes") (emphasis added).

As this Court explained in *Keller* v. *State Bar of California*, 496 U.S. 1, 12-13 (1990):

> Government officials are expected as a part of the democratic process to represent and to espouse the views of a majority of their constituents. * * * If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Indeed, as a practical matter, effective government would grind to a halt if every person had a right to insist that his or

her money not be used to support programs or positions with which he or she professes disagreement. *See Block*, 793 F.2d at 1313 (discussing the "practical problems of excluding the government from ideological debate"); *cf. United States* v. *Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief.").

Accordingly, the Speech Clause of the First Amendment simply does not provide a legal basis for objecting to government speech. The First Amendment limits government interference with *private* speech; it does not limit the government's *own* speech. Thus, while the First Amendment ordinarily prohibits the government from regulating speech on the basis of its content, this Court has "permitted the government to regulate the content of what is or is not expressed *when it is the speaker or when it enlists private entities to convey its own message.*" *Rosenberger*, 515 U.S. at 833 (emphasis added). *See also Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 541 (2001) ("We have said that viewpoint-based funding decisions can be sustained in instances *in which the government is itself the speaker, or instances * * * in which the government used private speakers to transmit specific information pertaining to its own program.*") (citations and quotation omitted; emphasis added).

To say that government speech is not restrained by the Speech Clause of the First Amendment is not to say that it is totally unassailable. Like any other government action, government programs designed to lend the government's voice to the marketplace remain subject to other constitutional constraints, including the Due Process Clause, the Equal Protection Clause, and even the Religion Clauses of the First Amendment. *See, e.g., Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000). More fundamentally, as in the case of any other government program, the public—through

the democratic process—may call for the end of that program, or insist on a different message. *See infra* at 39 n.8.

2.a. In deciding whether speech is government speech, the first factor to consider is whether the government itself is speaking. In *Lebron*, this Court provided clear guidance for making that determination. That case establishes that entities such as the Beef Board and Operating Committee are government entities for First Amendment purposes. Thus, the expressive activities in which those entities engage pursuant to the Beef Act readily qualify as government speech.

In *Lebron*, the National Railroad Passenger Corporation (better known as Amtrak) refused to allow the display of a political advertisement on a billboard controlled by Amtrak. The question for the Court was whether Amtrak should be considered part of the government for First Amendment purposes. The Court answered that question in the affirmative: "We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government *for purposes of the First Amendment*." 513 U.S. at 400 (emphasis added).

The three factors that led this Court to conclude that Amtrak "is part of the Government for purposes of the First Amendment"—(1) creation of the entity by special law; (2) furtherance of governmental objectives; and (3) retention of appointment authority—are all present here and compel the same conclusion with respect to the Beef Board and the Operating Committee. *First*, the Board and Committee were each "created by a special statute." *Id.* at 397. *See* 7 U.S.C. §§ 2904(1), (4)(A).

Second, the Board and Committee were created "explicitly for the furtherance of federal governmental goals." *Lebron*, 513 U.S. at 397. *See* 7 U.S.C. § 2904(2) (providing that the Board shall administer the Secretary's Order); *id.*

§ 2904(4)(B) (providing that the Committee "shall develop plans or projects of [beef] promotion"). The Beef Act was accompanied by congressional findings explaining that "the production of beef and beef products plays a significant role in the Nation's economy" and that "the maintenance and expansion of existing markets for beef and beef products are vital * * * to the general economy of the Nation." *Id.* §§ 2901(a)(2), (4). The Act declares it to be the "policy of Congress" and in "the public interest" to carry out "a coordinated program of promotion and research" designed to "strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products." *Id.* § 2901(b).

These "governmental objectives" were reaffirmed by Congress with the passage of the Federal Agricultural Improvement and Reform Act of 1996 ("FAIR Act"). *See* 7 U.S.C. § 7401. With specific reference to the Beef Act, *see id.* § 7401(a)(5), Congress found that "[i]t is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs." *Id.* § U.S.C. § 7401(b)(1). The promotion programs were found "to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities." *Id.* § 7401(b)(8)(B).

Third, the members of the Board and Committee serve "under the direction and control of federal governmental appointees." *Lebron*, 513 U.S. at 398. The Secretary of Agriculture appoints all the members of the Board, *see* 7 U.S.C. § 2904(1), half the Committee's members, *see id.* § 2904(4)(A), and has the power to remove all members of both, *see* 7 C.F.R. § 1260.213. Moreover, by establishing staggered, three-year terms of appointment for Board members (who may serve no more than two consecutive terms),

see 7 U.S.C. § 2904(3), and one-year terms of appointment for Committee members (who may serve no more than six consecutive terms), *see id.* § 2904(5), the Beef Act assures the Secretary's continuing role in determining the composition of the Board and Committee. This point, too, was emphatically reaffirmed with the passage of the FAIR Act. *See id.* § 7401(b)(1) (generic commodity promotion programs are "Government-supervised"); *id.* § 7401(b)(2) ("supervised by the Secretary of Agriculture"); *id.* § 7401(b)(8) ("under the required supervision and oversight of the Secretary of Agriculture").

In addition, the Act and the Order provide for the Secretary's substantial continuing oversight of the Board and Committee. *All* plans and projects developed by the Committee must be submitted to the Secretary for approval. 7 C.F.R. §§ 1260.168(e), 1260.169. The Secretary must also approve annual budgets submitted by the Board and the Committee. 7 U.S.C. §§ 2904(2)(D), (4)(C); 7 C.F.R. § 1260.150(g). The Committee must also obtain the Secretary's approval to enter into contracts for implementing and carrying out the promotional and research activities authorized by the Act. 7 U.S.C. § 2904(6); 7 C.F.R. § 1260.168(b),(f). The books and records of the Board and Committee are subject to inspection and audit by the Secretary, and the Board and Committee must prepare such reports as the Secretary may prescribe. 7 U.S.C. § 2904(7). The Board and Committee must also submit information to the Secretary as requested, and must provide notice of their meetings so that the Secretary or her representative may attend. 7 C.F.R. §§ 1260.150(m), (o), 1260.168(h), (i).

Thus, under *Lebron*, the Board and Committee are government entities for First Amendment purposes. This conclusion applies with even more force when other aspects of the Beef Act's statutory and regulatory scheme are considered. The Beef Act and Beef Order specifically define the powers and duties of the Board and Committee, *see* 7 U.S.C.

§§ 2904(2), (4)(A)-(C), (6), (7); 7 C.F.R. §§ 1260.149, 1260.150, 1260.167, 1260.168, including the expressive activities in which they may—and may not—engage. For instance, the Beef Act specifically prescribes the content of the speech at issue here—the generic promotion of beef. *See* 7 U.S.C. §§ 2901(b), 2904(4)(B). The Act further specifies that such promotion be directed solely to "advanc[ing] the image and desirability of beef and beef products with the express intent of improving the competitive position and stimulating sales of beef and beef products in the marketplace." *Id.* § 2902(13). The Act also requires the Board and Committee to "take into account similarities and differences between certain beef, beef products, and veal," and to "ensure that segments of the beef industry that enjoy a unique consumer identity receive fair and equitable treatment." *Id.* § 2904(4)(B)(i)-(ii). At the same time, the Act expressly *prohibits* the use of funds for the purpose of "influencing governmental action or policy." *Id.* § 2904(10).

In short, the Beef Board and Operating Committee are governmental instrumentalities "created to enable the Secretary of Agriculture to communicate [her] message that beef is good." *Frame*, 885 F.2d at 1131. This conclusion is squarely in keeping with Congress's intent in enacting the predecessor Beef Research and Information Act—which Congress specifically intended the Beef Act to "revise[] and strengthen[]," H.R. Rep. No. 99-271 (Part I), at 7—that, "[f]or purposes of administering the Act, *the Beef Board shall act as an agency of the Department of Agriculture.*" H.R. Rep. No. 94-452, at 4-5 (emphasis added). It is also in line with the Executive's own treatment of the Beef Board as a government entity for tax and other purposes. *See* U.S. Pet. 17 n.4.

b. Yet even if this Court were to conclude otherwise, the generic advertising at issue would *still* constitute government speech. The government may—and frequently does—use "private entities to convey a governmental message."

Rosenberger, 515 U.S. at 833. When it does, the communication is still government speech and free from First Amendment scrutiny. *See Legal Servs. Corp.*, 531 U.S. at 541 ("viewpoint-based funding decisions can be sustained in instances * * * in which the government *use[s] private speakers to transmit specific information pertaining to its own program*") (quotation omitted; emphasis added).

In *Rust* v. *Sullivan*, for example, this Court upheld a viewpoint-based restriction on the speech of *private* doctors conducting counseling activities with federal funds because the government had employed the doctors to communicate its own message. 500 U.S. at 194.[4] In this case, it is even more obvious than in *Rust* that the speech at issue is the government's own. Although this Court has not yet articulated a particular test for determining whether speech is government speech, its recent decisions indicate that, where the government (1) prescribes the general content of a particular message; (2) for the purpose of advancing governmental objectives; and (3) retains ultimate editorial control over and responsibility for the message, the speech is properly characterized as government speech. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 303 (student invocation at high school football game was government speech where invocation was "subject to particular regulations that confine the content and topic of the student's message"); *Legal Servs. Corp.*, 531 U.S. at 542 (program did not involve government speech where it did not "promote a governmental message"); *Southworth*, 529 U.S. at 229 (suggesting that, if public university

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[4] As the Court explained in *Legal Services Corp.*, "the Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors * * * amounted to governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding." 531 U.S. at 541. *See Rosenberger*, 515 U.S. at 833 (noting that in *Rust*, the government "used private speakers to transmit specific information pertaining to its own program").

uses its funds "to advance a particular message" and remains "responsible for its content," message is government speech).

Here, the general content of the speech at issue—that beef is "a valuable part of human diet" and that beef is a "desirab[le]" product—is prescribed by Congress. 7 U.S.C. §§ 2901(a)(1), 2902(13). The specific messages are formulated and communicated by special administrative bodies created by Congress and whose *raison d'être* is to carry out a congressionally-mandated program to further important governmental objectives. The Secretary of Agriculture retains final approval authority over and is ultimately responsible for the content of the specific messages. Thus, even if this Court were to conclude that the Board and Committee are private entities, it is clear that "when the Board or Committee 'speaks,' they do so on behalf of the Secretary of Agriculture." *Frame*, 885 F.2d at 1132. As a result, the speech they undertake pursuant to and under the strictures of the Beef Act and Beef Order is government speech.

3.a. The Eighth Circuit held in this case that the government speech doctrine is categorically inapplicable to cases, like this one, involving the compelled funding of speech. In its view, the government speech doctrine applies *only* in cases involving challenges to the government's "choice of content"; thus, government speech cases and compelled funding of speech cases "are fundamentally different," and never the twain shall meet. Pet. App. 17a. Because—in the Eighth Circuit's view—this case involves not the former but the latter category of cases, the court never actually decided whether the generic advertising conducted under the Beef Act is government speech.

The Eighth Circuit's conclusion—that government speech cases and compelled funding of speech cases "are fundamentally different"—finds no support in this Court's precedents. Indeed, if the Eighth Circuit were correct, *every* citizen—including smokers who object to the government's anti-

smoking ads, pacifists who object to the government's promotion of the armed services, and isolationists who object to the government's foreign policy—would have the constitutional right to insist that his or her tax dollars not be used to support programs or policies with which he or she disagreed. As explained, that is decidedly not the case. *See supra* at 22-23.

Moreover, this Court itself has specifically applied the government speech doctrine in the compelled funding context. In *Keller*, the Court considered whether an integrated state bar was a governmental entity and thus immune from a First Amendment challenge brought by some of the bar's members to the use of their dues to fund certain political and ideological activities to which they objected. *See* 496 U.S. at 12-13. Yet if government speech cases and compelled funding of speech cases "are fundamentally different," as the Eighth Circuit believed, the Court presumably would never have engaged in that inquiry.

Similarly, in *Southworth*, *supra*, this Court considered a challenge to a mandatory student activity fee imposed by a public university and used to support organizations engaging in political and ideological speech to which some students objected. There, the Court observed that "[i]f the challenged speech * * * were financed by tuition dollars and the University and its officials were responsible for its content, the case might be evaluated on the premise that the government itself is the speaker." 529 U.S. at 229. But "[t]he University having disclaimed [the] speech [as] its own," the case did not "raise the issue of the government's right * * * to use its own funds to advance a particular message." *Id.* Again, if the Eighth Circuit were correct, the Court would have had no occasion to make those observations.

b. Unlike the Eighth Circuit, the District Court at least recognized that the government speech doctrine applies in this case. In holding that the generic advertising under the

Beef Act is not government speech, however, the District Court made several different errors. To begin with, the District Court drew unsupported conclusions from the record evidence as to the nature and extent of the Secretary's involvement in the checkoff program. The court recognized that "all projects are submitted to the Secretary for final approval to spend checkoff funds for the project," and that "USDA employees attend every meeting of the Board, the Operating Committee, and the [Board's] Executive Committee." Pet. App. 55a. Nevertheless, relying solely upon a single "admission" purportedly made by a USDA official, the court concluded that the Secretary's oversight of the checkoff program is merely "ministerial." *Id.*

That conclusion is wholly unfounded. The court did not point to any record support for the alleged "admission," and we can find none. In fact, at trial the USDA official in question flatly *rejected* the contention that the Secretary's role in the checkoff program is simply "ministerial." *See* J.A. 303-304. Moreover, the record contains substantial, unrebutted evidence that the Secretary—acting through the Agricultural Marketing Service of USDA—in fact exercises extensive oversight and control over all aspects of the checkoff program.

As the record reflects, USDA's involvement in the checkoff program is a "full-time operation." J.A. 303. *See also* J.A. 268. USDA staff are involved in the activities of the Beef Board "every day." J.A. 268-269. USDA actively participates in all developmental phases of projects and ads, from the germination of an idea to its eventual incarnation. J.A. 111, 138, 230, 273-274, 278-279, 303-304. USDA may even propose ideas to the Board and Committee. J.A. 301-302. USDA must give final approval to *all* projects and ads, and reviews all ads and other promotional materials prior to their release. J.A. 111, 113-114, 224-227, 273-275, 278-279, 295, 298. Projects and ads undergo two levels of review, and no project or ad will be approved unless all changes re-

quested by USDA are made. J.A. 113-114, 142. USDA has rejected ads in the past, J.A. 118, 261, 275, and has likewise encouraged the Committee to reconsider proposals it has rejected. J.A. 263-264.

USDA officials also actively participate in *all* Beef Board Advisory Committee meetings, where projects and budgets are first proposed; all Operating Committee meetings, where projects and budgets are reviewed and initially approved; all Beef Board Executive Committee meetings, where projects are again reviewed and approved; and all full Beef Board meetings, where budgets are approved and the program's direction and goals are established. J.A. 111-113, 138-141. USDA officials review materials in preparation for such meetings and provide input to Board and Committee members both prior to and at the meetings themselves. J.A. 112-113, 124-125, 270-271.

USDA must also approve all budget proposals, which also undergo two levels of review. J.A. 113-114. USDA reviews every proposed contract for checkoff-funded services before it is entered into by the Board or Operating Committee, randomly spot checks every subcontract involving checkoff-funded services, and rejects any proposed contract that fails to comply with the Beef Act or otherwise raises concerns. J.A. 115, 144, 227, 277-278. USDA also reviews all audits of major contractors, as well as all audits of the Beef Board itself. J.A. 282, 300-301. USDA provides orientation to new Board members, advises the Board in its hiring decisions, and maintains final approval authority over the selection of the Board's Chief Operating Officer, who works closely with USDA. J.A. 115-116, 123, 130-131, 144, 230, 276-277. USDA also approves in advance any testimony provided by Beef Board members or employees to Congress. J.A. 115, 144, 260.

The District Court's conclusion that the Secretary's oversight of the checkoff program is merely "ministerial" is

simply not supported by the record in this case. Indeed, reviewing *essentially the same record*, a different district court held that the generic advertising under the Beef Act *is* government speech, concluding that "[b]y no means is the government's control over the checkoff-funded program *pro forma*." *Charter* v. *USDA*, 230 F. Supp. 2d 1121, 1138 (D. Mont. 2002), *appeal pending*, No. 02-36140 (9th Cir.).[5]

Equally baffling is the District Court's conclusion—purportedly "based upon the evidence," but again without citation to the record—that the Secretary's "approval" of those nominated to the Board "is merely *pro forma*." Pet. App. 55a. The Beef Act provides that the Secretary herself "appoint" members to the Board, not that she "approve" appointments. *See* 7 U.S.C. § 2904(1). As the record shows, the Secretary receives at least two nominations, sometimes more, for each open seat on the Board. J.A. 116, 266-267. *See also* 7 C.F.R. § 1260.143(d). Nominations are submitted by organizations certified by the Secretary under specific criteria set out in the Act. J.A. 266-267. *See* 7 U.S.C. § 2905. USDA reviews the applications of and conducts background checks on each individual nominated, and forwards all relevant information to the Secretary so she can make a decision. J.A. 267. Decision-making requiring the Secretary to choose between two or more candidates in this manner can hardly be labeled "*pro forma*."

c. The District Court also concluded that "in evaluating whether the Beef Act's generic advertising scheme constitutes 'government speech,' one must take into account whether the speech comes from general tax revenues or instead from some forced assessments paid for by members of one group." Pet. App. 53a. The court apparently derived that idea from *Frame*, *see* Pet. App. 52a, where the Third Circuit also drew a distinction between speech funded by

[5] The parties in *Charter* stipulated to the submission of the case for decision on the summary judgment record in that case and the trial transcript in this case. *See* 230 F. Supp. 2d at 1123.

general tax revenues and speech funded by other assessments. In the Third Circuit's view, "where the government requires a publicly identified group to contribute to a fund earmarked for the dissemination of a particular message associated with that group" there is a "coerced nexus" between the message and the individuals in the group. 885 F.2d at 1132. By contrast, the court reasoned, "[w]hen the government allocates money from the general tax fund to controversial projects or expressive activities, the nexus between the message and the individual is attenuated." *Id.*

That analysis is fundamentally flawed. The focus of the government speech inquiry is—and should be—on the entity that conveys the message at issue and on the process through which that message has been formulated. The focus is not—and should not be—on whether or to what extent the message might be ascribed to an individual (other than the speaker) as a result of the purported "nexus between the individual and the specific expressive activity." *Id.* at 1132. The latter inquiry lacks any grounding in this Court's First Amendment jurisprudence and provides a wholly unworkable rule of decision for distinguishing between government and non-government speech.

The Third Circuit derived its "nexus" analysis solely from a footnote in Justice Powell's concurrence in *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 259 n.13 (1977), which states:

> Compelled support of a private association is fundamentally different from compelled support of government. * * * [T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests.

See Frame, 885 F.2d at 1132-33. The pertinent distinction drawn by Justice Powell was not, as the Third Circuit apparently thought, the purported "nexus" between the individual and the message to which he objects. Instead, the distinction drawn was between being forced to associate with *private* speech—which is derived from "one segment of the population, with certain common interests"—and with *government* speech—which is derived from the government as "representative of the people." *Abood*, 431 U.S. at 259 n.13.

Thus, in determining whether the speech at issue in *Keller* constituted government speech, the Court focused on the entity that conveyed the message—the state bar—and *not*, as would have followed under the Third Circuit's analysis, the "nexus" between the bar's members and the message to which they objected. Because the Court concluded that the bar was not like a typical government agency or official who "[is] expected as a part of the democratic process to represent and to espouse the views of a majority of [its] constituents," the Court concluded that the messages it conveyed were not government speech. 496 U.S. at 12-13.

By contrast, here it follows under *Lebron* that the entities conveying the message to which plaintiffs object—the Beef Board and the Operating Committee—*are* government entities for First Amendment purposes. *See supra* at 24-26. Moreover, this case is distinguishable in a second, perhaps even more fundamental, respect. Here, unlike in *Keller*, the message being conveyed—that beef is "a valuable part of human diet," 7 U.S.C. § 2901(a)(1)—was formed in the first instance by *Congress* "as a part of the democratic process." 496 U.S. at 12. The Board and Committee were created by Congress with the express purpose of conveying that *particular* message to the public. They do so pursuant to precise governmental regulations and subject to the ongoing oversight and control of the Secretary of Agriculture.

No such governmental definition and control characterized the expressive activities of the state bar in *Keller*. The Court made clear that the messages at issue in that case represented the views of a particular group—the bar—on a wide and changing array of issues.[6] Here the message at issue was fixed by the representative of all the people—Congress—and is communicated under the direct supervision of the head of a federal agency who serves at the pleasure of the President. Although that message may be more beneficial to a particular group—which justifies Congress's decision to have that group fund its dissemination—there is no doubt that it is the *government's* message.

The fact that beef producers must pay to finance a government program designed to promote the commodity they sell is no different from pacifists paying to support the promotion of the armed services, or tobacco farmers paying to support government anti-smoking messages. In neither instance is the government attempting to compel adherence to its own message, as was the case in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where students were faced with expulsion and prosecution for failing to participate in the Pledge of Allegiance, or *Wooley* v. *Maynard*, 430 U.S. 705 (1977), where motorists were required to bear on their own vehicle license plates an ideological state motto they found morally objectionable.

The Beef Act simply requires producers (including respondents) to pay a modest assessment on the sale of cattle—a

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[6] The bar was alleged to have been engaged in such far ranging—and openly political—activities as "endors[ing] a gun control initiative, disapprov[ing] statements of a United States senatorial candidate regarding court review of a victim's bill of rights, endors[ing] a nuclear weapons freeze initiative, and oppos[ing] federal legislation limiting federal-court jurisdiction over abortions, public school prayer, and busing." 496 U.S. at 15. The Beef Act expressly prohibits spending for such political activities, *see* 7 U.S.C. § 2904(10), and expressly limits permissible speech activities to the promotion of beef. *See id.* §§ 2901(b), 2904(4)(B).

dollar per head of cattle that may have sold for upwards of $1,000 at market. The Beef Act neither "compel[s] [them] to utter what is not in [their] mind," *Barnette*, 319 U.S. at 634, nor makes them "the courier for [the government's] message." *Wooley*, 430 U.S. at 717. That is, no one has asked respondents to express *their* support of beef promotion, as in *Barnette*, or to bear such a message on *their* property, as in *Wooley*. For the government to compel political or ideological speech from the lips of a reluctant entity is worlds apart from compelling that entity to contribute financially to support government-supervised speech, especially when that speech directly furthers its own commercial interests. *See NAACP* v. *Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) ("Government communication is legitimate so long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.' ") (quoting *Wooley*, 430 U.S. at 717).

Justice Harlan made a similar point some time ago:

> What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to [an organization] fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. [*Lathrop* v. *Donohue*, 367 U.S. 820, 858 (1961) (concurring in the judgment).]

Society frequently calls upon its members to pay taxes, dues, or other assessments to support various organizations and entities both governmental and non-governmental. But no reasonable person would think that everyone who makes such a payment thereby endorses to the last jot and tittle the agenda of the recipient, because "the connection between the payment of an individual's dues and the views to which he

objects is factually so remote." *Id.* at 859. That is especially true here because, as this Court has held in another First Amendment context, a "reasonable observer" must be presumed to be aware of the "history and context" of a government program. *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 654-655 (2002) (rejecting argument that a state-funded school voucher program created a "public perception" that the State was endorsing religion) (quotation omitted).

Congress has broad authority to decide how to fund federal programs. *See Southworth*, 529 U.S. at 229 ("The government, as a general rule, may support valid programs and policies by taxes *or other exactions* binding on protesting parties.") (emphasis added).[7] Had Congress elected to fund

[7] As this Court has recognized across a spectrum of assessments, Congress has broad leeway to determine who should pay taxes or other exactions with respect to particular programs or commodities. *See, e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989) (statute requiring successful claimants before Iran-United States Claims Tribunal to pay assessments to cover Tribunal's operating costs); *Gurley* v. *Rhoden*, 421 U.S. 200 (1975) (state statute modeled on federal law imposing excise tax on producers of gasoline); *Steward Mach. Co.* v. *Davis*, 301 U.S. 548, 579-580 (1937) (discussing practice dating back to colonial times of imposing excise taxes "bound up with the enjoyment of particular commodities"); *Nicol* v. *Ames*, 173 U.S. 509, 526-527 (1899) (stamp tax on sale of cattle by those who availed themselves of privilege of using particular stockyards); *Head Money Cases*, 112 U.S. 580, 589-590 (1884) (statute imposing "duty" on shipowners of 50 cents per immigrant passenger to be used for an "immigrant fund" to pay for, among other things, care for recent immigrants). Indeed, as the Court has observed, it is not uncommon for commodity-specific assessments to be levied on those "who enjoy *no* direct benefit from its expenditure." *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 & n.14 (1937) (emphasis added) (noting that some state taxes on the sale of cigarettes and tobacco are used "for school funds and educational purposes" and even "for pensions for Confederate soldiers"; taxes on the sale of liquor are used for "old age pension funds" and "school funds"; and that taxes on legalized horseracing are used for "fairs and agricultural purposes"). Here, of course, the assessments at issue are imposed on the class of individuals most likely to benefit from their expenditure. *See* 7 U.S.C. 2904(8)(C).

the generic advertising under the Beef Act with general tax revenues, there would be no question that the program's speech is government speech. The constitutional analysis should be no different simply because Congress decided, rather than using general tax revenues, to impose a modest assessment on those who, in Congress's judgment, "most directly reap the benefits of the program[]," 7 U.S.C. § 7401(b)(2), and who as a group have voted to fund the program. The generic advertising remains the government's message, with the content specified by Congress and articulated under the oversight and control of the Secretary.[8]

II. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS CONSTITUTIONAL UNDER THE *CENTRAL HUDSON* ANALYSIS.

Even if this Court were to conclude that the generic advertising under the Beef Act is not government speech, the Beef Act nonetheless survives First Amendment scrutiny under the traditional test for commercial speech articulated by this Court in *Central Hudson*. Under the *Central Hudson* test, a regulation of commercial speech is constitutional if it

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[8] In *Southworth*, the Court suggested that, in cases involving government speech, a court must consider "whether traditional political controls [exist] to ensure responsible government action." 529 U.S. at 229. In prescribing a program of promotional activity, the Beef Act expressly prohibits the use of assessments for the purpose of "influencing governmental action or policy." 7 U.S.C. § 2904(10). The Act and Order also require all plans and projects, as well as all budgets for promotional activities, to be approved by a politically accountable official, the Secretary. *Id.* § 2904(4)(C); 7 C.F.R. § 1260.169. Congress further provided that the program would continue only if approved by a majority of the cattle producers and importers voting in an initial referendum twenty-two months after the issuance of the Beef Order, 7 U.S.C. § 2906(a), and authorized additional referenda on whether to continue the program at any time thereafter if requested by a representative group comprising at least ten percent of cattle producers. *Id.* § 2906(b). Accordingly, whatever "traditional political controls" may be required "to ensure responsible government action," the Beef Act and Beef Order amply provide them.

(1) promotes a "substantial" government interest; (2) "directly advances [that] interest"; and (3) is "not more extensive than necessary to serve that interest." 447 U.S. at 566. The Beef Act readily meets each of those criteria here.[9]

First, it cannot be seriously disputed that the Beef Act promotes a substantial governmental interest: ensuring the welfare of the largest segment of the American agricultural economy. The Beef Act was enacted after a decades-long crisis in the beef industry and after previous congressional efforts had failed to alleviate the crisis. *See supra* at 8-10. Against that backdrop, Congress specifically enacted the Beef Act to "strengthen the beef industry's position in the marketplace" and thereby improve "the general economy of the Nation." 7 U.S.C. §§ 2901(a)(4), (b). Congress also expressly determined that the Act was "vital" and "in the public interest." *Id.* §§ 2901(a)(3), (b). Indeed, at a time of increased public concern over food safety in both domestic and foreign markets, the promotional and educational activities called for by the Beef Act are perhaps more "vital" than ever. *See supra* at 15-16.

Thus, as the Third Circuit put it in *Frame*, the Beef Act serves the substantial—indeed "compelling"—governmental interest of "preventing the collapse of a vital sector of the national economy," which would "endanger not only the country's meat supply but the entire economy." 885 F.3d at

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[9] The Eighth Circuit purported to "adapt" *Central Hudson* to this case. Pet. App. 22a. Instead of applying *Central Hudson*'s straightforward criteria, however, the court applied a bewildering amalgam of *Central Hudson* and other precedents that finds no support in this Court's First Amendment jurisprudence. *See* Pet. App. 22a-28a. Indeed, in the end, the Eighth Circuit concluded that *United Foods* was ultimately dispositive of the *Central Hudson* analysis. Pet. App. 26a-28a. In *United Foods*, however, this Court never suggested that the outcome of the *Central Hudson* test—which it specifically declined to apply because the argument had not been raised, *see* 533 U.S. at 410—would somehow be controlled by its analysis in *United Foods*.

1134 n.12. *See also id.* at 1134 (Beef Act passed to "prevent[] further decay of an already deteriorating beef industry").[10] At the same time, the Act also serves "important non-economic interests," such as "ensur[ing] preservation of the American cattlemen's traditional way of life." *Id.* at 1134-35. That "way of life" has long played an instrumental role in shaping—and defining—the American experience. *See supra* at 6-7.

Second, the Beef Act "directly advances" those substantial governmental interests. As this Court has frequently recognized, "there is an *immediate connection* between advertising and demand." *Central Hudson*, 447 U.S. at 569 (emphasis added). *See Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 557 (2001) ("In previous cases, we have acknowledged the theory that product advertising stimulates demand for products."). Here, the "immediate connection" between the promotion conducted under the Beef Act and the demand for beef is well-documented. *See, e.g.*, Ronald W. Ward, *Evaluating the Beef Promotion Checkoff*, 4 National Inst. for Commodity Promotion Research & Evaluation Quarterly, No. 4, at 2 (1998) ("the beef checkoff has had a positive and statistically significant influence on the [number of] servings" of beef consumed in the United States) (emphasis omitted); Ronald W. Ward & Chuck Lambert, *Generic Promotion of Beef: Measuring the Impact of the US Beef Checkoff*, 44 J. of Agric. Econ. 456, 464 (1993) ("beef checkoff programmes have caused a measurable and signifi-

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[10] In *Frame*, the Third Circuit held that the Beef Act survives scrutiny under *Central Hudson* because it in fact survives scrutiny under an even *stricter* First Amendment standard. *See* 885 F.2d at 1134 n.12; *see also id.* at 1133-37 (Beef Act survives strict scrutiny under the standard articulated in *Roberts* v. *United States Jaycees*, 468 U.S. 609 (1984)). In *Cochran* v. *Veneman*, 359 F.3d 263, 277 (3d Cir. 2004)—which did *not* involve the Beef Act—the Third Circuit concluded that *United Foods* had somehow "abrogated" *Frame*. 359 F.3d at 274. As noted, however, in *United Foods* the Court specifically declined to apply *Central Hudson* because the argument had not been raised. *See supra* at 40 n.9.

cant shift in the demand for beef," with "gains * * * registered at the producer level").

The record itself contains substantial evidence of this direct and immediate connection in the report of Ronald W. Ward, a professor of agricultural economics and a leading expert on the impact of the beef checkoff on the beef industry who regularly advises the Beef Board. J.A. 166-167, 169. In his report—as in numerous publications—Mr. Ward presents peer-reviewed statistical models that demonstrate that the generic advertising under the Beef Act has had "a measurable and statistically significant impact on the demand for beef." J.A. 170. On average, the promotion under the Beef Act yields a return of more than $5.65 for every dollar spent. *See* J.A. 172. Other evidence further demonstrates that the promotional activities conducted under the Beef Act—especially the "Beef. It's What's for Dinner." ad campaign—are effective. *See supra* at 14. Thus, by increasing demand for and sales of beef, the Beef Act "directly advances" the government's interest in "maint[aining] and "expand[ing] * * * existing markets for beef and beef products." 7 U.S.C. § 2901(a)(4).

Third, the Beef Act is no "more extensive than necessary to serve" those governmental interests. As this Court has emphasized, a regulation of commercial speech need not employ the "*least* restrictive means" to accomplish its objectives. *Lorillard*, 533 U.S. at 556 (emphasis added). Rather, all that is required is "a *reasonable* fit between the legislature's ends and the means chosen to accomplish those ends." *Id.* (emphasis added; quotation omitted). As the Third Circuit concluded in *Frame*, the Beef Act "infringes on the contributors' rights no more than necessary to achieve the stated goal." 885 F.2d at 1137.

To begin with, the Beef Act merely requires producers to pay a modest assessment to support the *generic* promotion of beef—from which, in Congress's judgment, all producers of

that commodity benefit. *See* 7 U.S.C. § 7401(b)(2). It does not "compel any person to engage in any actual or symbolic speech" or "compel the producers to endorse or to finance any political or ideological views." *Wileman*, 521 U.S. at 469-470. Indeed, the Act expressly prohibits the use of funds for political activities. *See* 7 U.S.C. § 2904(10). Nor does the Act "impose[] [any] restraint on the freedom of any producer to communicate any message to any audience." *Wileman*, 521 U.S. at 469. To the contrary, producers are entirely free to communicate *any* message concerning beef—or anything else—that they desire.[11]

Moreover, the Beef Act contains numerous features designed to ensure that producers are satisfied with the benefits they receive under the checkoff program and that they have an opportunity to provide input concerning the content of the program. The program itself was established by a referendum requiring approval of a majority of producers voting in the referendum, and is subject to termination or suspension by referendum at any time if a majority of producers voting in a referendum so favor. 7 U.S.C. §§ 2906(a), (b). Producers, of course, sit on the Beef Board, and are appointed by the Secretary from nominations submitted by other producers. *Id.* § 2904(1). As Congress found, "[i]f the beef promotional program is to succeed, the program will need input and support from the beef industry." H.R. Rep. No. 99-271 (Part I), at 189.

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[11] Congress's decision to fund the program by targeted assessments on the sale of cattle as opposed to general tax revenues also ensures that the Beef Act is no more extensive than necessary to serve Congress's objectives. While certain taxpayers—*e.g.*, vegetarians or animal-rights activists—may have an objection to the promotion of beef, Congress could reasonably assume that the individuals most likely to support the promotion of beef were those who choose to make a living *selling* it. *See Wileman*, 521 U.S. at 470 ("since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program").

As the Third Circuit concluded in *Frame*, the mandatory assessments under the Beef Act "play[] an integral role in advancing both the economic and non-economic goals of the Act." 885 F.2d at 1135. As the court explained, a mandatory program is necessary to avoid "free-riders," who would "receiv[e] the benefits of the promotion and research program without sharing the cost." *Id.* at 1135. This Court itself has recognized a "vital policy interest in * * * avoiding 'free riders' " where important governmental interests are implicated. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 507, 519 (1991) (collective bargaining). Here, the "free-rider" problem would pose an insurmountable obstacle to the success of a voluntary program, thus impeding the important governmental objectives that the Beef Act is intended to serve.

As Mr. Ward explains in his report, "given that the product has little differentiation," if the checkoff program were voluntary "some [producers] [would] choose not to participate even though they benefit equally." J.A. 168. Thus, because of "the equity concerns" with free riders, a voluntary program would likely fail. J.A. 169. In other words, producers are unlikely to contribute to a voluntary program if others will simply take a "free ride" on their contributions. Indeed, it is telling that the *mandatory* promotion and research program under the Beef Act was approved by an overwhelming majority of producers voting in a referendum, whereas referenda held to approve the *voluntary* promotion and research program under the predecessor Beef Information and Research Act *twice* failed to garner the support of the requisite majority of voting producers.

Finally, the payment of assessments into a collective advertising fund is also necessary to advance the government's substantial interests. As Mr. Ward explains, "the cost of a meaningful promotion program to an individual is likely so large that it is an impractical option except in those cases where the producer has a large share of the market."

J.A. 168.[12] Indeed, nearly eighty percent of all types of cattle producers in the United States own fewer than a hundred head of cattle; more than sixty percent own fewer than fifty. *See* U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., *Cattle* 12 (Jan. 31, 2003). Such producers are unlikely to be able to afford access to major media outlets, and thus—even if, in the aggregate, they match the Beef Board dollar for dollar—simply cannot reach the same audience that the Board can when it, say, runs its "Beef. It's What's for Dinner." ad on national television during the Super Bowl.[13]

Because an individual producer simply does not get the same "bang for his buck" when he spends it on his own advertising than when he contributes it to the Board, a "credit" system for individual advertising expenditures is simply not feasible.[14] Indeed, if every producer were to obtain a credit for his own advertising expenditures, the important governmental objectives of the Beef Act would not be achieved. As just explained, because of the "high entry cost[s]," most producers cannot conduct a "meaningful promotion program" that would reap the statistically proven benefits of the checkoff program. J.A. 168-169. Thus, even assuming that the total *amount* of advertising for beef would

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[12] Because of the free-rider problem, however, large producers are unlikely to make the significant expenditures necessary to mount a "meaningful promotion program." *See* J.A. 168-169.

[13] Checkoff funds are also used to promote U.S. beef in *foreign* markets. The typical individual domestic beef producer scarcely has the means or the incentive to market his particular product overseas. The Beef Act's mandatory assessment program thus plays a crucial role in ensuring that the United States maintains its share of the world's beef export market. *See supra* at 14-15.

[14] Although the Beef Act permits producers who have contributed to programs established by qualified State beef councils to obtain a credit of up to 50 cents for contributions to such programs, *see* 7 U.S.C. § 2904(8)(C), State beef councils have significant budgets and thus are more likely to conduct "meaningful promotion programs." *See* Brief for Texas, *et al.* as *Amicus Curiae* in Support of Petitioners at 8-9 (in support of certiorari).

be the same under a credit system, the *type* of advertising conducted by each individual producer would likely be too modest and too localized to appreciably "strengthen the beef industry's position in the marketplace" and thereby improve "the general economy of the Nation." 7 U.S.C. §§ 2901(a)(4), (b). If every producer (or a significant percent of producers) were to conduct his own advertising instead of contributing to the checkoff program's collective fund, the Beef Act could not accomplish those objectives, either.

The events of the past year have underscored the importance of a collective fund for beef promotion and education. The discovery of a BSE-infected cow in the United States in December 2003 created a new crisis for the U.S. beef industry. The ability—made possible only by the Beef Act—to respond swiftly and *nationally* to that crisis has been critical in ensuring the welfare of the industry during this volatile period. *See supra* at 15-16.[15]

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[15] The virtues of institutions promoting agricultural commodities on a national scale have long been extolled. In his Eighth Annual Address to Congress, President George Washington not only touted the "primary importance" of agriculture to the "national welfare," but the importance of "[i]nstitutions for promoting it * * * supported by the public purse." 1 *Messages and Papers of the Presidents* 202 (James D. Richardson ed. 1903). As Washington noted, "[a]mong the means which have been employed to this end none have been attended with greater success than the establishment of boards * * * charged with collecting and diffusing information, and enabled by premiums and small pecuniary aids to encourage and assist a spirit of discovery and improvement." *Id.* Washington further emphasized that these boards "are very cheap instruments of immense national benefits," because they are able to stimulate "enterprise" in this area by collecting and "spreading [agricultural information] thence over the whole nation." *Id.* More than two centuries after Washington delivered those remarks, the Beef Board—"enabled by premiums and small pecuniary aids"—serves as a similar "instrument[] of "immense national benefits," not only by promoting beef nationally, but, in response to events such as the BSE case, by swiftly disseminating information about the safety of beef to consumers "over the whole nation."

III. THE GENERIC ADVERTISING CONDUCTED UNDER THE BEEF ACT IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *WILEMAN*.

In *Wileman*, this Court upheld a similar generic advertising program for California tree fruit because the program (conducted pursuant to marketing orders issued by the Secretary) was viewed as "a species of economic regulation," and therefore not subject to First Amendment scrutiny. *Wileman*, 521 U.S. at 477. *See also United Foods*, 533 U.S. at 415 (assessments in *Wileman* "were nothing more than additional economic regulation, which did not raise First Amendment concerns"). In *United Foods*, the Court distinguished *Wileman* on the ground that the generic advertising in *United Foods* was "not part of some broader regulatory scheme." *Id.* As the Court noted, " 'the mushroom growing business is * * * unregulated, except for the enforcement of a regional mushroom advertising program.' " *Id.* at 413 (quoting court of appeals). *See id.* at 412 (no laws "regulate how mushrooms may be produced and sold"). Indeed, "[t]he only program the Government contend[ed] the compelled contributions serve[d] [was] the very advertising scheme in question." *Id.* at 415.

This case is closer to *Wileman* than *United Foods* because the beef promotion conducted under the Beef Act is part of a "broader regulatory scheme" governing the beef industry. *Id.* at 415. Like the marketing orders in *Wileman*, numerous statutes regulating the manner in which beef is marketed and sold help "establish and maintain orderly marketing conditions and fair prices for agricultural commodities." 521 U.S. at 461 (citing 7 U.S.C. § 602(1)).

The Packers and Stockyards Act, 7 U.S.C. §§ 181 *et seq.*, for example, gives the Secretary of Agriculture the authority to "prescribe the rate, charge, regulation, or practice" of stockyard owners, market agencies, and dealers in connection

with the buying, selling, or marketing of livestock. *See* 7 U.S.C. § 212. The Act further requires that all rates and charges for stockyard services be posted and be "just, reasonable, and nondiscriminatory." *Id.* §§ 206-207. The Livestock Mandatory Reporting Act, 7 U.S.C. §§ 1635 *et seq.*, requires packer processing plants to report detailed price information to the Secretary at least twice daily and requires the Secretary to make such information available to the public at least three times daily. *See id.* § 1635e. These reporting requirements are specifically intended to help producers "negotiate the best possible price for their livestock." S. Rep. No. 106-168, at 2 (1999).

The Federal Meat Inspection Act ("FIMA"), 21 U.S.C. §§ 601 *et seq.*, establishes a meat inspection and labeling system. Pursuant to the Agricultural Marketing Act of 1946 ("AMA"), 7 U.S.C. §§ 1621 *et seq.*, the Secretary has established a voluntary beef grading program. *See id.* § 1622(h); J.A. 282; *see also Wileman*, 521 U.S. at 462 (marketing orders "govern[ed] marketing matters such as fruit size and maturity levels"). Both of these programs are intended to ensure orderly market conditions and favorable prices for producers. The FIMA, for instance, recognizes that "[u]nwholesome, adulterated, or misbranded meat * * * destroy[s] markets for wholesome * * * meat * * * and result[s] in sundry losses to livestock producers." 21 U.S.C. § 602. Likewise, the AMA expressly declares as among its objectives to ensure that agricultural products "may be marketed in an orderly manner" and that "the full production of American farms * * * be disposed of usefully, economically, profitably, and in an orderly manner." 7 U.S.C. § 1621. *See also id.* § 1622(h) (directing establishment of grading programs "to the end that agricultural products may be marketed to the best advantage").

This extensive regulation of the beef industry—not as pervasive, to be sure, as the marketing orders in *Wileman*—nonetheless stands in stark contrast to the "unregulated"

mushroom market considered in *United Foods*. 533 U.S. at 413.[16] The Beef Act—enacted to "strengthen the beef industry's position in the marketplace," 7 U.S.C. § 2901(b)—is properly viewed as "ancillary" to this "broader regulatory scheme." *United Foods*, 533 U.S. at 411. Moreover, the required degree of additional regulation under *Wileman* to justify a program of producer-supported promotion should not be considered in isolation from the nature of the promotion. Regulation of a degree such as that characterizing the beef industry should suffice to bring compelled funding of speech within *Wileman* when the speech is strictly limited to generic promotion as under the Beef Act.

Indeed, as Justice Breyer explained in his dissent in *United Foods*, the generic nature of the advertising at issue should be enough to bring this case entirely within the ambit of *Wileman*. There, as Justice Breyer observed, the Court "gave the following reasons in support of [its] conclusion" that the generic advertising at issue "did not 'rais[e] a First Amendment issue,' " but rather "was 'simply a question of economic policy for Congress and the Executive to resolve' ":

> "First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. Second, they do not compel any person to engage in any actual or symbolic speech. Third, they do not compel the producers to endorse or to finance any political or ideological views." [533 U.S. at 419 (quoting *Wileman*, 521 U.S. at 468-470) (alteration in original).]

As Justice Breyer explained, the promotional program in *United Foods*, "although it involve[d] mushrooms rather than

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[16] In *United Foods*, moreover, the Court noted that "almost all of the funds collected under the mandatory assessments are for one purpose: generic advertising." *Id.* at 412. Here, by contrast, a significant portion of each checkoff dollar is used for something *other* than promotion, such as research and education. *See* Beef Report at 3 (16.01% of Beef Board's 2003 budget used for education and 10.55% used for research).

fruit, [was] identical in each of these three critical respects." *Id.* at 420. Accordingly, "these similar characteristics demand[ed] a similar conclusion." *Id.*

The same is true here. "Respondents are not required themselves to speak, but are merely required to make contributions for advertising." *Wileman*, 521 U.S. at 471. At the same time, the program does not "abridg[e] * * * anybody's right to speak freely." *Id.* at 474. Nor are assessments "used to fund ideological activities." *Id.* at 473. As a result, "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience." *Id.* at 472. In sum, like the assessments at issue in *Wileman*, the assessments under the Beef Act are "a species of economic regulation," *id.* at 477, that simply "[do] not raise First Amendment concerns." *United Foods*, 533 U.S. at 415.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

GREGORY G. GARRE
LORANE F. HEBERT*
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

Counsel for Petitioners